From: Carl Lumma
To: Microsoft ATR
Date: 11/17/01 6:10am
Subject: Illegal Climate? (in the style The New York Times ;)

First, allow me to suggest that the points agreed upon in the recent settlement with Microsoft (MS) are meaningless -- nothing but the collected idle gripes of anyone who's ever had a product 'ruined' because MS used the Windows desktop as ad space for their own competing product while the plaintiffs actually had to get users to run an installer to convert the desktop into a billboard on their behalf. If advertising were the issue, users ought to be able to charge for their desktop space. [If you get caught thinking this far-fetched, consider that such a system has evolved in the shareware industry.] But advertising is a non-issue; anti-trust legislation is not meant to reward reparations to vanquished competition. The issue is preserving a climate for future competition.

The smorgasbord of gripes, even if we didn't agree with the above, or if we did agree that MS should be punished but could see no other course of action, is at least so difficult to implement that it is effectively harmless to MS and useless in supporting a competitive marketplace. The Justice Department, who takes three years and three judges to get a "settlement", would have us imagine that they can enforce such a complex and ambiguous policy in market-time?

The one single, effortlessly and unimpeachably enforced, admirably fair and effective sanction that could have been imposed on MS but was not is: A Complete Good-till-canceled Moratorium on Exclusionary Licencesing. The measure would leave MS to compete with only their own highly-touted (and justly so) merits as a software maker and their indisputable dominance, even by classical standards, of the computer software marketplace. [It can be argued that the engine of backward-compatibility means egregious degree of dominance x in a classical market is on the order of unstoppable monopoly 10x in the computer software market, once the size of the software standard in question, and thus the cost of engineering a new standard from the ground up, reaches a certain point. After, only a 'shadow' (playing in the dominator's sandbox) model is viable; a niche which never seems to win more than 5% (and seldom more than 1%) of such a sandbox, even in the volatile arena of microprocessor hardware, where the sandbox in question is defined by a relatively small and well-published item; an instruction set vs. oceans of poorly-commented and poorly documented MS source code.]

This raises the question: is exclusionary licensing against the law? The answer is: It isn't. It is a practice grandfathered everywhere from soda fountains to newspaper routes. Has Microsoft done anything illegal at all? It has been found to be a monopoly, and to the extent

that is illegal we are justified to meddle in some of the more aggressive of their trading practices, and exclusionary/restricted licensing policy is the Jimmy Valentine of their notorious efforts here, especially regarding their publicly-leaked goal of eradicating the Linux sandbox.

But is MS really a Monopoly? I have dispute x with Jackson's findings of fact... Instead of asking Jackson, let's ask Linus Torvalds, a person with more knowledge of the computer industry, and likely with more general intelligence anyway. He asks if there is any company other than MS _at all_, in any sandbox, that is profitable on the basis of EULA software binaries. With the forgettable (if not dubious) exceptions of Adobe and Corel, the answer would have to be: No. Notable are Sun and Apple; companies with excellent software products who tried unsuccessfully to leave their hardware-based economics. Also notable is IBM, the hardware company that gave birth to MS but was unable to profit on software, finding a role only as a service/solution provider. In a market truly so difficult, is there any one who would hear Microsoft cry Judas having been denied the right to restrictively license their product?

-Carl

CC: smalin@well.com@inetgw,jeremy@keyspan.com@inetgw